Supreme Court, U.S.
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No. 96-538

In the Supreme Court of the United States

OCTOBER TERM, 1996

GARY FROST AND GEORGE JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the term "thing of value" as used in 18 U.S.C. 876 includes a salaried position as a city councilman.

2. Whether an anonymous note threatening to expose embarrassing information if an elected official does not resign constitutes "wrongful" conduct subject to 18 U.S.C. 876.

3. Whether the government's references to Nuremburg and the Gestapo in its closing argument rendered petitioners' trial fundamentally unfair.

4. Whether the jury instructions fairly and adequately addressed the issues at trial.

5. Whether petitioner Johnson's perjury conviction should be reversed under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), even though petitioner did not challenge the trial court's failure to submit the issue of materiality to the jury until after the court of appeals had issued its decision.

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 10a-32a) is reported at 61 F.3d 1518. The opinion of the court of appeals modifying its original opinion (Pet. App. 5a-9a) is reported at 77 F.3d 1319.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1995, and modified on March 19, 1996. Suggestions for rehearing en banc were denied on June 6, 1996.[1] Pet. App. 1a-2a. The petition for a writ of cer-

[1] Under Eleventh Circuit Rules 35-6 and 35-7, a suggestion for rehearing en banc is treated as a petition for panel rehearing and stays issuance of the mandate until it is decided.

tiorari was filed on September 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioners Gary Frost and George Johnson were convicted of attempting to obstruct interstate commerce by extortion, in violation of 18 U.S.C. 1951; of conspiracy to commit extortion by use of the U.S. mails, in violation of 18 U.S.C. 371; and of extortion by use of the U.S. mails, in violation of 18 U.S.C. 876. In addition, Johnson was convicted of making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. Frost was sentenced to 33 months' imprisonment, to be followed by three years' supervised release. Johnson was sentenced to 51 months' imprisonment, to be followed by three years' supervised release. On appeal, the court affirmed petitioners' convictions but reversed their sentences and remanded to the district court. Pet. App. 10a-32a. The court of appeals later amended its opinion to reverse petitioners' convictions for attempting to obstruct interstate commerce by extortion. *Id.* at 5a-9a. Frost was resentenced to 14 months' imprisonment, to be followed by three years' supervised release. Johnson was resentenced to 18 months' imprisonment, to be followed by three years' supervised release.

1. In 1988, Edward Wayne Martin was elected Mayor of Warner Robins, Georgia. Pet. App. 12a. At that time, petitioner Johnson was the police chief of Warner Robins, and petitioner Frost was a major in the police department. *Ibid.* While in office, Martin clashed with William Douglas, a member of the Warner Robins City Council. In late 1990, Douglas

drafted, and the council passed, several ordinances that reduced the Mayor's spending authority. *Ibid.*; Gov't C.A. Br. 6.

Sometime before April 1991, Wiley Bowman, Warner Robins' Director of Public Works, learned that Douglas was meeting with a woman (not his wife) at various locations around the city. Bowman discussed that fact with Martin and Johnson. Martin asked Bowman if he could prove that Douglas was having an affair; Bowman and Frost subsequently made a videotape of Douglas and the woman, using a police video camera supplied by Johnson. Gov't C.A. Br. 8-9. Johnson then made two copies of the tape and—after viewing the tape in Martin's office with Bowman, Frost and others—gave a copy to Martin. *Ibid.*; Pet. App. 13a.

Six days later, on April 22, 1991, Douglas received a copy of the videotape in the mail at City Hall, along with a handwritten note (on which Martin's fingerprint was later found) threatening to give a copy of the tape to the mayor and Douglas's wife if Douglas did not resign from the city council immediately. That same day, Frost asked the city employee who delivered the package about Douglas's reaction, and stated that he (Frost) "bet [Douglas] was upset." Johnson was present during that conversation. Pet. App. 12a-13a; Gov't C.A. Br. 10. On May 1, 1993, Martin called Douglas to his office and told him that he had received a copy of the videotape in the mail. Later, Martin told Douglas that if Douglas resigned, "maybe they won't send a copy to your wife." Pet. App. 13a. In early 1992, Johnson told another police officer that Douglas would not be running for Mayor because "[w]e have a tape, a videotape of Douglas and his girlfriend in a car[.]" *Id.* at 14a-15a. Nonetheless,

in January 1993, Johnson appeared before the grand jury and falsely testified that he had left a particular copy of the videotape at his house, where, he added, it might have been taped over. In fact, Johnson had given the tape to a former employee. Gov't C.A. Br. 32-34.

2. Petitioners and Martin were indicted for their roles in the mailing of the videotape and note; Johnson was also indicted for perjuring himself before the grand jury. Pet. App. 11a. The jury returned guilty verdicts against all defendants on all counts.

3. The court of appeals affirmed in part, reversed in part, and remanded for resentencing. Pet. App. 5a-32a. The court rejected petitioners' claim that the government's closing argument required a mistrial. Although the court noted that the prosecutor's reference (in her rebuttal closing) to Nazi Germany was "ill-advised,"[2] it concluded upon review of the

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[2] Towards the end of her rebuttal closing, the prosecutor told the jury:

> Frost relies, or Frost attempts to rely for his behavior on the defense of "I was following orders. I was told to do what I did." This is the same defense that was used at Nuremberg, it was the same defense used in Vietnam. Gary Frost is not a rookie cop. He is not a cop who didn't know what he was doing[.]

Gov't C.A. Br. 48. Defense counsel made no objection to the argument. Further into the rebuttal argument, the prosecutor stated:

> What they did to Mr. William Douglas and what they would have done to others is no different than what the Gestapo did in World War II. It is no different than the

comment in context and the entire record that the remarks did not render the trial fundamentally unfair. *Id.* at 22a. The court of appeals also rejected petitioners' challenge to the jury instructions regarding the legality of the surveillance of Douglas. The court concluded that those instructions fairly and adequately addressed the issues and correctly stated the law. *Id.* at 24a. Because it determined that the district court had applied the wrong sentencing guideline, however, the court of appeals remanded for resentencing. *Id.* at 32a.[3]

Johnson then filed a suggestion for rehearing en banc, contending, for the first time, that the district court had erred in failing to submit to the jury the issue of whether his false statements to the grand jury were material. Frost also filed a suggestion for rehearing en banc. While those filings were pending, the court of appeals modified its original opinion to hold that the evidence at trial failed to show a sufficient link between the attempted extortion and interstate commerce, and it therefore reversed defendants' convictions under 18 U.S.C. 1951. Pet. App. 5a-9a. Frost and Johnson then renewed their suggestions for rehearing en banc, which were denied on June 6, 1996.

> authorities in Third World countries do to the people under their protection[.]

Ibid. When defense counsel objected, the court admonished the prosecutor to "[s]tick to this case." *Ibid.*; Pet. App. 67a.

[3] The court of appeals also rejected many arguments that petitioners do not renew in this Court. Pet. App. 17a-29a.

DISCUSSION

1. Petitioners argue (Pet. 6-9) that they did not commit extortion because Douglas's position on the city council was not a "thing of value" under 18 U.S.C. 876, which makes it unlawful knowingly to deposit in the U.S. mail, "with intent to extort from any person any money or other thing of value," any communication "addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another." According to petitioners, the term "thing of value," should be interpreted to mean "property," which in turn should be narrowly construed (under petitioner's view of Georgia law) to exclude an intangible right to hold public office. That claim is without merit.

Even if the term "thing of value" in 18 U.S.C. 876 were confined to "property interests" to which due process protections would attach—a proposition for which petitioners cite no authority—petitioners' argument would fail on its own terms: Whether or not officials elected to state or local office have a "vested" right to compensation under Georgia law (see Pet. 7), petitioners concede that Douglas, who drew a salary as a city councilmember (see Gov't C.A. Br. 15), did have a property interest in his position sufficient to trigger due process protections. Pet. 7; see *City of Ludowici* v. *Stapleton*, 375 S.E.2d 855, 856 (Ga. 1989) ("We recognize that '[a]n elected city official who is entitled to hold office under state law has a property interest in his office which can be taken from him only by procedures meeting the requirements of due process.'") (quoting *Crowe* v. *Lucas*, 595 F.2d 985, 993 (5th Cir. 1979)); see also *United States* v. *Gorman*, 807 F.2d 1299, 1305 (6th Cir.

1986) (offer of employment is a "thing of value" under 18 U.S.C. 201(g)), cert. denied, 484 U.S. 815 (1987).[4] In any event, Douglas's elected position plainly constituted a "thing of value" under Section 876. As used in that statute, the term has been expansively construed to include a broad variety of tangible and intangible matters. *United States* v. *Nilsen*, 967 F.2d 539, 542-543 (11th Cir. 1992), cert. denied, 507 U.S. 1034 (1993); *United States* v. *Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974); *United States* v. *Scott*, 884 F.2d 1163, 1166 (9th Cir. 1989), cert. denied, 506 U.S. 901 (1992); see also *United States* v. *Schwartz*, 785 F.2d 673, 679-680 (9th Cir.), cert. denied, 479 U.S. 890 (1986); *United States* v. *Croft*, 750 F.2d 1354, 1361-1362 (7th Cir. 1984); *United States* v. *Girard*, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979).[5]

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[4] Petitioners (see Pet. 9) rely on cases involving the terms "thing of value" and "property" in a different statute, 18 U.S.C. 641, which addresses the theft or conversion of government property. Those cases do not support petitioners' argument. Two of them—*United States* v. *Matzkin*, 14 F.3d 1014, 1020-1021 (4th Cir. 1994), cert. denied, 116 S. Ct. 175 (1995), and *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.), cert. denied, 444 U.S. 871 (1979)—affirmed convictions under Section 641 on the ground that that provision covers a broad range of tangible and intangible property interests; Douglas's interest in retaining his position falls well within that range. Although *United States* v. *Tobias*, 836 F.2d 449 (9th Cir.), cert. denied, 485 U.S. 991 (1988), did conclude that Section 641 does not apply to "intangible goods" such as classified information, the Ninth Circuit based that conclusion on the legislative history of that particular statute, 836 F.2d at 451 n.2, which is, of course, inapplicable here.

[5] Petitioners also claim that interpreting the phrase "thing of value" to include a salaried position renders Section 876 either vague or overly broad. Pet. 8, 10. Because petitioners failed to raise those constitutional challenges below, they are

2. Petitioners also challenge their extortion convictions on the theory that the note they sent to Douglas did not seek an inherently "wrongful" objective, but was "merely intended to make Mr. Douglas resign from a position in which he held no vested interest and was in no way intended to obtain anything for the communicator of the threat." Pet. 11. That argument is also without merit.

Petitioners appear to rely on cases interpreting the Hobbs Act, which defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. 1951(b)(2); see Pet. 10 (citing *United States* v. *Buffey*, 899 F.2d 1402 (4th Cir. 1990)). Under that statute, however, a conviction for extortion does not require that the extortionist actually obtain anything of value for himself, because "the gravamen of the offense is loss to the victim." *United States* v. *Hyde*, 448 F.2d 815, 843 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); see also *United States* v. *Lance*, 536 F.2d 1065 (5th Cir. 1976). It is similarly irrelevant to the validity of petitioners' convictions under 18 U.S.C. 876 that they did not

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not properly presented here. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). In any event, because the term "thing of value" is commonly understood to include intangibles, it is not so vague that ordinary persons cannot understand what conduct is prohibited. *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Nor is the statute, which reaches only extortionate speech, subject to challenge on overbreadth grounds. *United States* v. *Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988); see also note 6, *infra*.

themselves seek the city council position that they tried to force Douglas to vacate.[6]

3. Petitioners contend (Pet. 12-17) that the government's closing argument was unduly prejudicial. Both of the lower courts considered and rejected that claim. In particular, the court of appeals concluded, after examining the record in its entirety, that the prosecutor's references to Nazi Germany in her closing argument did not render the trial fundamentally unfair. Pet. App. 22a. Petitioners identify no reason why this Court should reconsider that factbound determination.

4. Petitioners also assert (Pet. 17-21) that the district court deprived them of their "Sixth Amendment right to effective argument" by failing to instruct the jury that the surveillance of Mr. Douglas was legal. The district court did, however, instruct the jury that:

> it is undisputed that the Warner Robins Police Department, assisted by other City employees,

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[6] Likewise unavailing is petitioners' claim that their conduct was protected under the First Amendment. Extortionate threats are not, without more, "speech" entitled to constitutional protection. *United States* v. *Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988); *United States* v. *Bellrichard*, 994 F.2d 1318, 1321-1323 (8th Cir. 1993), cert. denied, 510 U.S. 928 (1993); *United States* v. *Quinn*, 514 F.2d 1250, 1268 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976); see also *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992). Petitioners rely for their contrary position on *Wurtz* v. *Risley*, 719 F.2d 1438 (9th Cir. 1983), a decision striking down a Montana intimidation statute on overbreadth grounds. The Ninth Circuit has declined, however, to reach the same result under Section 876, citing the "major differences" between the two statutes. *Hutson*, 843 F.2d at 1234.

> conducted an investigation of William Douglas' suspected criminal behavior. It's also undisputed that Mr. Douglas was never prosecuted as a result of that investigation. Under Georgia law, police officers have the right to investigate anyone who is suspected of engaging in criminal behavior. Police officers, however, do not have the right to use the results of such an investigation for an illegal purpose.

Pet. App. 74a-75a. That instruction plainly informed the jury that the investigation of Mr. Douglas, who was undeniably engaging in adultery, was legal. Thus, petitioners' claim that the jury instructions were constitutionally inadequate is without foundation.

5. Finally, Johnson contends (Pet. 21-22) that the court of appeals erred in failing to reverse his perjury conviction under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995). In *Gaudin*, this Court held that the Constitution requires a trial court to submit the issue of materiality to the jury when it is an element of a charged offense. Here, Johnson did not request a jury instruction on materiality, and none was given. Moreover, although *Gaudin* was decided on June 19, 1995, Johnson did not seek to amend his brief or otherwise raise a *Gaudin* claim before the panel's original decision was issued on August 25, 1995. Instead, Johnson raised his *Gaudin* claim for the first time in a suggestion for rehearing en banc, which was denied.

The record does not indicate why Johnson's request for rehearing on the *Gaudin* claim was denied. The court of appeals may well have determined that Johnson had waived his *Gaudin* claim by failing to

raise it in a timely manner on appeal. See *Moore* v. *United States*, 598 F.2d 439, 441-442 (5th Cir. 1979) ("Absent exceptional circumstances, this court will not consider new matters raised for the first time in a petition for rehearing.") It is also possible that the court considered that claim and found that it lacked merit. In particular, the Eleventh Circuit has determined, in accordance with all other circuits that have addressed the issue except the Ninth (see *United States* v. *Keys*, 95 F.3d 874 (9th Cir. 1996) (en banc)), that *Gaudin*-type errors are subject to plain error review under Fed. R. Crim. P. 52(b). See *United States* v. *Kramer*, 73 F.3d 1067, 1074 (11th Cir.), cert. denied, No. 96-607 (Dec. 2, 1996). It is possible, therefore, that the court of appeals applied the plain error standard to Johnson's claim and concluded that it was not satisfied.

Because of that possibility, this case should be held pending this Court's decision in *Johnson* v. *United States*, cert. granted, No. 96-203 (Nov. 15, 1996), which involves the appropriateness of plain-error review of *Gaudin*-type errors. If this Court were to conclude in *Johnson* that plain error analysis is never appropriate to review such errors, the Eleventh Circuit might wish to reconsider its decision denying petitioner's rehearing petition. On the other hand, if this Court affirms the approach of the Eleventh Circuit and concludes that plain error analysis is appropriate in reviewing *Gaudin*-type errors to which a defendant did not object at trial, the petition should be denied.

CONCLUSION

As to the first four questions, the petition for a writ of certiorari should be denied. As to the fifth question, the petition should be held pending this Court's decision in *Johnson* v. *United States*, cert. granted, No. 96-203 (Nov. 15, 1996), and then disposed of accordingly.

Respectfully submitted.

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